In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,
Petitioner,

vs.

LOUIS NELSON, Warden, California State Prison at San Quentin,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

Joined In and Adopted by the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, and Wisconsin, The Territory of Guam, and The National District Attorneys' Association, Appearing as Amici Curiae.

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ARGUMENT

SINCE PETITIONER DID NOT APPROPRIATELY PRESENT THE "INHERENT POWER" ISSUE TO THE COURT OF APPEALS, IT CANNOT BE RAISED NOW.

In Argument I, at page 15, of respondent's brief herein, we noted that petitioner had not raised the "inherent power" argument in the Court of Appeals. On Wednesday, November 13, 1968, Mr. J. Stanley Pottinger, counsel for petitioner, telephoned and directed our attention to pages 4-8 of his supplemental brief filed in the Court of Appeals.[1] Those pages do indeed discuss "inherent power," but we do not view them as squarely presenting the issue to the Court of Appeals.

The "inherent power" concept was not relied on in the District Court, and the District Court did not purport to invoke it in issuing its order (see A 34-35, 39). Nor was "inherent power" discussed in petitioner's initial brief in the Court of Appeals. At oral argument, the Court of Appeals requested supplemental briefs directed to the requirements of former Rule 81(a)(2). Petitioner's supplemental brief, sub-

[1]We initially questioned petitioner's standing to argue this point in our response in opposition to the petition for certiorari. Mr. Pottinger also informed us that after our response had been filed, he filed a reply thereto in which he referred to pages 4-8 of his supplemental brief. Unfortunately, however, we did not receive a copy of that reply, for a check made after Mr. Pottinger's telephone call disclosed no notation of receipt in our mail-clerk's docket, nor did our files herein contain a copy. None of the attorneys responsible for the preparation of the briefs herein could recall having seen a "reply."

We do note, however, that Mr. Pottinger has since provided us with a copy of that reply, which we received on November 26, 1968.

mitted thereafter, contained four arguments, which were presented under the following headings:

> "I. Discovery in habeas corpus proceedings conforms to prior discovery practices in actions at law and suits in equity."
>
> "II. The rules providing for discovery have not been precluded by statutes of the United States."
>
> "III. The applicability of discovery rules to habeas corpus proceedings will not lead to abuse or oppression."
>
> "IV. Service of interrogatories under Rule 33 rather than Rule 26 was proper, and should not be a controlling consideration in the present action."

On pages 4-6 of this supplemental brief, the "inherent power" material appears as part of the first argument relating to "prior discovery practices." But we did not, and do not, read these pages as properly presenting a new basis for supporting the order of the District Court. Nor, apparently, did the Court of Appeals, for that court did not discuss "inherent power" in its decision.

Petitioner discussed "inherent power" to buttress his argument that "discovery in habeas corpus proceedings conforms to prior discovery practices in actions at law and suits in equity." After discussing the discovery permitted in civil actions prior to the adoption of the Federal Rules in 1938, petitioner argued:

> "It should also be pointed out that the courts have had the power and jurisdiction to order dis-

covery not only under the Equity Rules mentioned above, but also according to their inherent power. This inherent power predates the adoption of the Federal Rules of Civil Procedure, and discovery engaged according to this power has been practiced generally prior to such Rules. See *United States v. Nolte*, 39 F.R.D. 359 (N.D. Cal. 1965). See also *Shores v. United States*, 174 F.2d 838 (8th Cir. 1949), and *United States v. Pete*, 111 F. Supp. 292 (D.D.C. 1953), and *United States v. Taylor*, 25 F.R.D. 225 (E.D. N.Y. 1960). Each of these cases, and others mentioned in *Nolte*, further establish the courts' power to order discovery not solely according to the jurisdiction of the Federal Rules, but also under their residual power to be exercised in the interests of justice. Although these cases are criminal rather than civil, the inherent power exercised there is relevant to habeas corpus actions. The courts have exercised their inherent power to obtain discovery because of the traditional practice of giving the utmost protection to a person's life and liberty typically at stake in criminal cases. These aspects of criminal cases are also present in habeas corpus proceedings. In such proceedings the courts have always exercised great flexibility in taking evidence and employing procedures appropriate to the particular cases before them, for the protection of the petitioner's fundamental rights. See 1 Bailey, *Habeas Corpus and Special Remedies* (1913). These established discretionary practices stem from and are a part of the same inherent powers exercised by the courts in criminal cases, including the practice of compelling discovery.

> "That the courts have not until recently exercised their powers (inherent or statutory) to engage in discovery in habeas corpus proceedings does not indicate in any way that such discovery was not indulged in to some extent, or that it could not have been indulged in to a great extent. Nor should a lack of frequent discovery be construed as a prohibition against it now. General discovery failed to take place in the late nineteenth century and early twentieth century because the writ of habeas corpus was at that time a very limited writ, in small use, exercised largely as a summary proceeding without need for discovery." (Petitioner's [Respondent below] Supplemental Brief, pp. 4-6).

Petitioner used the "inherent power" argument to support his claims insofar as "prior discovery practices" were concerned. This is made abundantly clear by: (a) his placement of the "inherent power" discussion in Argument I; (b) his efforts to avoid the fact that the cases cited were decided after the Federal Rules were adopted and that no habeas corpus case had invoked "inherent power" either before or after the Rules were promulgated; and (c) his failure to urge "inherent power" as a separate basis for sustaining the District Court, without regard to whether the exercise of "inherent power" to permit discovery in habeas corpus had ever been practiced in habeas corpus before 1938. We do not believe that petitioner's present argument was properly before the court below. Since petitioner urged this as part of his "prior discovery practices" argument in the Court

of Appeals, he should not now be permitted to transform it to a separate basis irrespective of prior practice in habeas corpus.

CONCLUSION

For the foregoing reasons, we respectfully submit that since it was not appropriately presented to the Court of Appeals, the "inherent power" issue is not properly before this Court and should be disregarded for the reasons set out in Argument I of Respondent's Brief.

Dated, November 29, 1968.

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